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No. 91-1162

Supreme Court, U.S.
MAR 2 6 1992

IN THE

# *Supreme Court of the United States*

October Term, 1991

SID GOODMAN & COMPANY, INC.,

*Petitioner*,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## I. THIS MATTER MERITS THIS COURT'S REVIEW NOW

A split in circuit authority is a compelling reason to grant a petition. But, contrary to the government's suggestion (Brief at 4-5), the absence of such a split does not preclude review. It should not in this case. As noted in the Petition (at 9-10), the defense of a PACA license revocation proceeding is a major expense. For some

licensees, it could be a crippling expense. The cost of subsequent judicial appeals may be prohibitive. Because Sid Goodman & Co. has already incurred these expenses, and properly framed the issues, this Court should grant the Petition. To defer review, until a split in the circuits develops, could unnecessarily force many PACA licensees to incur the cost of defending revocation proceedings based on the Department's erroneous interpretation of the implied duty clause.

Petitioner is hard pressed to understand how the Solicitor General can characterize, as of "limited significance" (Brief at 5), a question of statutory interpretation impacting an industry which employs over four million people.[1] The government had it right the first time, when it represented to the Court of Appeals below that this question "is an issue of great importance ... ." Pet. at 8. Similarly, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and its progeny, represent one of the foundations of modern administrative law. It certainly is important to know if this Court continues to believe that administrative agencies must announce new interpretations of statutes "as much as possible" by rulemaking. *332 U.S. at 202*..

## II. THE ADDITION OF THE IMPLIED DUTY CLAUSE WAS NEVER INTENDED TO PROVIDE THE DEPARTMENT WITH UNRESTRAINED DISCRETION TO REGULATE THE PERISHABLE COMMODITIES INDUSTRY

The government argues that the addition by Congress of the implied duty clause was sufficient and intended

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[1] United Fresh Fruit and Vegetable Association, 1991 Annual Report at 1.

to transform a detailed and highly specific licensing scheme into an unlimited prohibition on all "unfair practices" in the perishable agricultural commodities industry. This argument, however, ignores both the plain language of the clause and disregards several fundamental tenets of statutory construction.

The implied duty clause provides that it shall be unlawful for licensees "to fail to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." *7 U.S.C. § 499b(4)*. The clause does not make the performance of general unfair trade practices unlawful. Had Congress intended to do so, it would have used the "unfair practices" language that it had previously used in subsection (1) of the very same section of PACA. *INS v. Cardozo-Fonseca, 480 U.S. 421, 432 (1987)* ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").[2] Although the government recognizes that other statutes contain general prohibitions on unfair trade practices, it nevertheless argues that the implied duty clause should be recast as an additional prohibition on unfair practices in the perishable agricultural commodities industry. As Petitioner has noted previously, rather than steering the Court toward the government's

[2] The government's reliance on the word "any" in the clause, to overcome the absence of broad unfair practices language, is similarly misguided. The use of "any" to modify "specification or duty" and "undertaking" does not change the fact that only "fail[ures] to perform" such duties are punishable. Nor does it change the fact that Congress chose not to use the "unfair practices" language used elsewhere in the Act.

"tortuous construction" of the PACA, the existence of these other statutes "should deter [the Court] from" doing so. *Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989).* This is true even where the construction would clearly achieve the purposes of the Act in question. *Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989).*[3]

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[3] Contrary to Respondent's assertions, and as government conceeded at oral argument, there is no evidence that Petitioner, Sid Goodman & Co., "marked-up" the price of Offutt melons sold to Magruder above market prices. On the contrary, the record shows that the per-unit prices charged to Magruder for Offutt melons were consistently lower than those charged to some other purchasers. Load Report on M. Offutt & Co. Melons, December 31, 1987 (reprinted in Joint Appendix in *Sid Goodman & Co. v. United States, No. 90-2209, Slip op. (4th Cir. Oct. 1, 1991) at 299-300).* Specifically, on every day that Offutt melons were sold to Magruder, Offutt melons were also sold to other Purchasers at higher per-unit prices. For example, on December 29, 1987, Magruder purchased 32 units of Offutt melons, at $6.00 per unit. On that same day, Capital Produce purchased 45 units of Offutt melons at the higher price of $7.00 per unit. Id.

## III. THE DEPARTMENT MUST DO MORE THAN SAY IT HAS COMPLIED WITH CHENERY

The government argues that the Department's regulation, 7 C.F.R. § 46.26, satisfies *Chenery's* mandate because that regulation recites that it was impossible to announce in advance "all" of the various forms of conduct that might fall within the Department's interpretation of the implied duty clause. Brief at 11, n.12. That approach merely side-steps *Chenery*.

The Department never attempted to list any of the kinds of conduct that it believed would constitute a ground for license revocation under the implied duty clause. In the case of the conduct at issue here, as shown in the Petition (at 19, n. 26), not only was the Department aware of the problem, it had addressed similar conduct, in similar circumstances, by rulemaking. The issue under *Chenery* is not whether all possible implied duties can be defined. It is whether the Department has defined as many "as possible." 332 U.S. at 202. Here, the Department did not even attempt to do so. That was not an abuse of an exercise of discretion. It was a total failure of the Department to exercise its discretion. *Chenery* permits the Department to reserve, as necessary, the ability to proceed by adjudication. In the absence of any evidence that it was "not possible" for the Department to announce, in advance, its "commercial bribery" interpretation of the implied duty clause, it was improper for the Department to do so for the first time in an adjudicatory proceeding.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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